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Attorneys for Defendants and Counterclaimants

AT&T MOBILITY LLC and AT&T MOBILITY II LLC

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ENOVSY LLC,

Plaintiff,

vs.

AT&T MOBILITY LLC and AT&T
MOBILITY II LLC,

Defendants.

AND RELATED COUNTERCLAIM

Case No.: 2:11-CV-05210-SS

**AT&T'S BENCH BRIEF ON
INTRODUCTION OF EVIDENCE
DIRECTED TO STRICKEN
INFRINGEMENT THEORY AT
TRIAL**

The Hon. Suzanne H. Segal

Trial Date: August 18, 2015

1 **Introduction**

2 On Friday (Day 4 of this trial), Enovsys violated this Court's order by
 3 eliciting testimony directed to an infringement theory that Judge Olguin previously
 4 excluded. Defendants, AT&T Mobility LLC and AT&T Mobility II LLC
 5 (collectively "AT&T") request the Court to issue an order prohibiting Plaintiff,
 6 Enovsys, LLC, from further reference at trial to precluded infringement theories. In
 7 particular, Enovsys's permitted infringement theory for the "continuous tracking"
 8 limitation is limited to allegations of continuous tracking occurring on AT&T's
 9 location *platform*. AT&T requests that Enovsys be precluded from mentioning
 10 continuous tracking with respect to elements of the AT&T *network* (e.g., the Home
 11 Location Register) that are not included in the accused location *platform*.

12 **Background**

13 AT&T moved to strike, *inter alia*, a previously undisclosed infringement
 14 theory appearing in the expert report of Dr. Christopher Rose, designated as T15:

15 Additionally, the AT&T *network* knows (i.e., effectively tracks) the
 16 coarse locations of phones at all times, e.g., via the Cell ID. The cell
 17 location can be converted to other forms (e.g., longitude and latitude)
 18 using the VCID database.

19 D.I. 239, Ex. 1, p. 42 (emphasis added); *see also* D.I. 264, at 7 (clarifying
 20 that "[a]s to theory T15, Enovsys's expert now opines that 'continuous tracking' is
 21 performed by storing location information in AT&T's *home location register*
 22 (HLR)"). On November 4, 2014, Judge Olguin granted AT&T's motion to strike
 23 Enovsys's undisclosed infringement contention identified as "T15." *See* D.I. 376, at
 24 17. Enovsys then filed a Motion for Reconsideration of the Court's November 4,
 25 2014 Order, in response to which Judge Olguin affirmed his exclusion of the
 26 undisclosed theory. *See*, D.I. 408, at 5.

27 Despite Judge Olguin's orders excluding this improper infringement theory
 28 regarding "continuous tracking" being performed by the HLR (*i.e.*, an element of

1 the AT&T **network** outside of the location **platform**), Enovsys persisted at trial in
 2 questioning AT&T's expert witness, Dr. Stephen Wicker, as to this excluded theory:

3 Q: And I think you said that the AT&T **network** does not continuously
 4 track cell phones; correct?

5 A: I believe we were focused on the location **platform**, and that's
 6 what Dr. Rose pointed to. I said the location **platform** does not
 continuously track.

7 Q: Okay. So the AT&T **network** does continuously track cell phone
 8 location; correct?

9 A: Even that's not continuous. If you're referring to **registration**
 10 **messages** that are sent to the **home location register**, even that is not
 continuous.

11 Q: Is it periodic?

12 A: It's roughly periodic, yes.

13 See Trial Transcript Day 4 AM (August 21, 2015), at 102: 1–12 (emphasis
 14 added). Having already run afoul of this Court's orders on the issue, Enovsys should
 15 be precluded from any further reference to this twice-stricken theory of
 16 infringement.

17 **Argument**

18 Courts have consistently held that introduction of an excluded theory, in
 19 violation of a court order, is impermissible. *See, e.g., Brown v. Royalty*, 535 F.2d
 20 1024, 1028 (8th Cir.1976) (finding that repeated, deliberate reference to evidence
 21 excluded by district court, including in the closing statement, is clear misconduct
 22 and grounds for new trial); *Adams Laboratories, Inc. v. Jacobs Engineering Co.*,
 23 761 F.2d 1218, 1226 (7th Cir.1985) (plaintiff's counsel's reference to excluded
 24 evidence in direct contravention of the district court's order held to constitute
 25 prejudicial error); *McWhorter v. City of Birmingham*, 906 F.2d 674, 676–77 (11th
 26 Cir.1990) (affirming district court's decision to grant new trial because counsel's
 27 closing argument focused on theory eliminated during pretrial conference and on
 28

1 evidence expressly excluded by trial judge); *United States v. Van Eyl*, 468 F.3d 428,
2 429 (7th Cir. 2006) (affirming the district court's decision to grant a new trial,
3 because "the government's closing argument contained a damaging theory of guilt
4 that the court had earlier excluded in response to a motion *in limine*").

5 Enovsys previously represented to the Court in its opposition to AT&T's
6 Motion *in Limine* No. 2 that it "has no intention of asserting the precluded theories
7 at trial." *See* D.I. 423-1, at 13. In denying AT&T's motion as generalized, the Court
8 indicated that it would "consider particularized objections at trial." D.I. 501, at 6.
9 Further, the Court cautioned Enovsys that its infringement theory should not exceed
10 the scope of the permitted expert opinions. *See id.* at 9.

11 **Efforts to Resolve the Issue**

12 AT&T contacted Enovsys' counsel on Sunday to raise this issue and to ask if
13 Enovsys would agree not to mention elements of the AT&T network (outside the
14 accused location platform) as satisfying the claim limitations related to continuous
15 tracking for the remainder of the trial. Although there were several communications
16 between the parties on Sunday afternoon and evening, Enovsys was not willing to
17 agree.

18 **Conclusion**

19 Enovsys cannot be permitted to introduce a stricken theory in its rebuttal
20 examination of Dr. Christopher Rose or in its closing argument. For these reasons,
21 AT&T requests an order precluding Enovsys from reference to "continuously
22 tracking" being performed by the HLR or any other element of the AT&T **network**
23 that is outside of the accused location **platform**. AT&T further requests that the
24 testimony of Dr. Wicker identified above be stricken from the record.
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Respectfully submitted,

BAKER BOTTS L.L.P.

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AT&T MOBILITY LLC and AT&T
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